

incompatible with those to be deployed by the D Block licensee for that area? Would allowing compensation for early deployment of incompatible technologies stand as a disincentive to auction participation by commercial entities?

#### 10. Open Platform/Wholesale Conditions

305. Background. In the *Second Report and Order* we declined to restrict the D Block licensee to operating exclusively on a "wholesale" or "open-access" basis.<sup>548</sup> We concluded that it would not serve the goals of the Public/Private Partnership to impose special wholesale or open-access requirements on the D Block licensee.<sup>549</sup> Instead, we provided the D Block licensee with the flexibility to provide wholesale or retail services or other types of access to its network that comply with our rules and the NSA.<sup>550</sup> We reasoned that the D Block licensee has the flexibility to choose the commercial service it will provide based on its determination of market needs; and that this flexibility improves the viability of the 700 MHz Public/Private Partnership and serves the interests of public safety.<sup>551</sup> With respect to services offered to public safety, we noted that the Public Safety Broadband Licensee will have the right to determine and approve specifications for public safety equipment used on the network and the right to purchase its own subscriber equipment from any vendor it chooses, to the extent such specifications and equipment were consistent with reasonable network control requirements established in the NSA.<sup>552</sup>

306. In the *Second Further Notice*, we sought comment on whether we should require the D Block licensee to operate on an exclusively wholesale or open access basis.<sup>553</sup> We asked for comment on how an open access environment might affect public safety, and whether we need to clarify or revise the operational responsibilities of the D Block and the Public Safety Broadband Licensees if we were to adopt a wholesale approach.<sup>554</sup> Further, we sought comment on whether maintaining a flexible approach would improve the viability of the Public/Private Partnership.<sup>555</sup>

307. Comments. In response to the *Second Further Notice*, we received some comments on this subject matter. Motorola recommends that the Commission impose an open platform condition and allow public safety to use any device or application provided it does not harm the network.<sup>556</sup> Wireless RERC recommends consideration of an open access network contending that such a condition would allow public safety entities access to numerous suppliers of IP-based communications equipment and systems capable of interconnecting with the network.<sup>557</sup> It believes that this would allow the communication of emergency information to be accessible in many formats.<sup>558</sup> Cellular South argues that the Commission should impose a mandatory wholesale condition as a way to give smaller carriers entry

<sup>548</sup> *Second Report and Order* at ¶ 545.

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Second Report and Order* at ¶¶ 405-406, 546.

<sup>553</sup> *Second Further Notice* at ¶ 187.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> Motorola Comments at 11.

<sup>557</sup> Wireless RERC Comments at 14.

<sup>558</sup> Wireless RERC Comments at 15.

into the market.<sup>559</sup> PISC states that the Commission should impose both open access and wholesale conditions as they will help enhance competition and further public interest goals.<sup>560</sup>

308. Qualcomm argues that the Commission should not impose an open platform condition or forbid any particular business models.<sup>561</sup> AT&T argues that the Commission should not impose an open access platform or a mandatory wholesale condition because it violates the flexible use approach which has proven to produce the best technological and business practices.<sup>562</sup> It further asserts that a public/private partnership will fail if it is constrained by conditions not compatible to the reality of the market.<sup>563</sup> Google recommends that the Commission not impose open access or wholesale conditions for the present time, and states they should keep a careful watch on anti-consumer practices and intervene with such measures when appropriate.<sup>564</sup> Coleman Bazelon argues against imposing a wholesale condition because the spectrum will be most valuable to the larger carriers.<sup>565</sup> Ericsson argues against imposing a wholesale condition because such limitations on the business plan of the D Block licensee would make bidding less attractive to many potential bidders.<sup>566</sup> CTIA recommends that the Commission base its rules on the same market oriented, flexible-use service rule model that has successfully created today's wireless marketplace.<sup>567</sup> Verizon notes that the Commission should reject calls to impose wholesale-only and open access requirements.<sup>568</sup> Motorola supports "open access for public safety subscriber equipment and applications from multiple sources that meet public safety requirements."<sup>569</sup>

309. Discussion. In the *Second Report and Order*, we declined to impose broad open access or wholesale service requirements in the 700 MHz band because we found that it would not serve the goals of the Public/Private Partnership to mandate these requirements on the D Block licensee specifically.<sup>570</sup> Rather, we decided that the D Block licensee should be given the flexibility to choose the commercial service it would provide.<sup>571</sup> In our determination, we noted that the effects of an open access environment were unknown, and, before it was mandated, it was necessary to understand the impact that mandatory provisions would have on the public safety environment.<sup>572</sup> In this Third Further Notice, we tentatively conclude not to impose a mandatory wholesale or open access condition on the D Block licensee. Comments in support of mandatory wholesale and open access provisions have not established the impact that these provisions would have on the public safety environment and the goals of the

<sup>559</sup> Cellular South Comments at 3-4.

<sup>560</sup> PISC Comments at 7-10.

<sup>561</sup> Qualcomm Comments at 11.

<sup>562</sup> AT&T Comments at 18; AT&T Reply Comments at 10-14.

<sup>563</sup> AT&T Comments at 18.

<sup>564</sup> Google Comments at 10; Google Reply Comments at 1-4.

<sup>565</sup> Coleman Bazelon Comments at 22.

<sup>566</sup> Ericsson Comments at 35.

<sup>567</sup> CTIA Reply Comments at 8-9.

<sup>568</sup> Verizon Wireless Reply Comments at 19 n.43.

<sup>569</sup> Motorola Comments at 7.

<sup>570</sup> *Second Report and Order*, 22 FCC Rcd at 15476-77, 15478 ¶¶ 545, 549.

<sup>571</sup> *Id.*, 22 FCC Rcd at 15476-77 ¶ 545.

<sup>572</sup> *Id.* (citing NPSTC 700 MHz Further Notice Reply Comments at 8-9).

Public/Private Partnership. We reaffirm that the D Block licensee has the flexibility to provide wholesale or retail services or other types of access to its network to comply with our rules and the NSA.<sup>573</sup> We believe that this flexibility improves the viability of the Public/Private Partnership, serves the interests of public safety, and is supported by the record.

310. With respect to subscriber equipment and applications offered to public safety, we propose to retain the flexibility afforded to public safety subscribers in the *Second Report and Order*. Specifically, we propose to retain the rights of the Public Safety Broadband Licensee to determine the public safety equipment and applications that would be used on the network. We also propose to retain the rights of public safety entities to purchase their own subscriber equipment and applications from any vendor they choose, provided that the equipment and applications they purchase are consistent with reasonable network management requirements and approved by the Public Safety Broadband Licensee. We seek comment on these proposals.

## 11. Other Rules and Conditions

311. In the *Second Further Notice*, we sought comment generally on whether, aside from the subjects specifically that we specifically discussed, we should modify any other aspects of the rules or conditions for the 700 MHz Public/Private Partnership. We tentatively conclude that, aside from the specific changes we have proposed in this *Third Further Notice*,<sup>574</sup> we should retain the existing rules governing the 700 MHz Public/Private Partnership largely without modification.

### C. Public Safety Issues

#### 1. Eligible Users of the Public Safety Broadband Spectrum.

312. Background. Section 337(a)(1) of the Communications Act requires the Commission to allocate 24 megahertz of spectrum between 746 MHz and 806 MHz for "public safety services."<sup>575</sup> Section 337(f)(1) of the Act defines "public safety services" as follows:

(f) Definitions – For purposes of this section:

(1) Public Safety Services – The term "public safety services" means services –

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided -

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.<sup>576</sup>

In establishing license eligibility rules for the 700 MHz public safety band in Section 90.523 of our rules

<sup>573</sup> Applicable rules include, but are not limited, provisions regarding leasing in Subparts Q and X of Part 1 of the Commission's rules.

<sup>574</sup> The specific rule changes we propose are included as Appendix G.

<sup>575</sup> 47 U.S.C. § 337(a)(1).

<sup>576</sup> 47 U.S.C. § 337(f).

we sought to mirror these eligibility requirements.<sup>577</sup>

313. Section 90.523(e) includes specific eligibility provisions applicable to the Public Safety Broadband Licensee.<sup>578</sup> Like the narrowband license eligibility provisions set forth in Sections 90.523(a)-(d),<sup>579</sup> we intended the provisions of Section 90.523(e) to ensure that the use of the 700 MHz public safety broadband spectrum, under the auspices of the Public Safety Broadband Licensee, be consistent with the statutory definition of “public safety services” in Section 337(f)(1)—both to ensure that the band remained allocated to such services, as required by Section 337(a)(1)—as well as to focus the Public Safety Broadband Licensee exclusively upon the needs of public safety entities that stand to benefit from the interoperable broadband network.<sup>580</sup>

314. In the *Second Further Notice*, we identified certain aspects of Section 90.523 that may need clarification. First, we identified two elements of the statutory definition of “public safety services” that the eligibility rules that could be construed as not applying explicitly enough to the Public Safety Broadband Licensee: (1) the Section 337(f)(1)(A) element that requires that the “sole or principal purpose ... is to protect the safety of life, health, or property;” and (2) the Section 337(f)(1)(C) element that bars such services from being “made commercially available to the public by the provider.”<sup>581</sup> Second, we observed that there may be some ambiguity as to the applicability of the narrowband eligibility provisions in Sections 90.953(a)-(d) to the Public Safety Broadband Licensee.<sup>582</sup> Accordingly, we sought comment as to whether we should make minor amendments to Section 90.523 to: (a) clarify that the services provided by the Public Safety Broadband Licensee must conform to all the elements of the statutory definition of “public safety services;” and (b) clearly delineate the differences and overlap in the respective eligibility requirements of the narrowband licensees and the Public Safety Broadband Licensee.<sup>583</sup>

315. As a corollary to examining whether the services provided by the Public Safety Broadband Licensee must conform to all the elements of the statutory definition of “public safety services,” we also examined whether, under Section 337 of the Act and in furtherance of the policies that led to the creation of the Public Safety Broadband Licensee, the eligible users of the public safety broadband network that are represented by the Public Safety Broadband Licensee should be restricted to entities that provide “public safety services,” as defined in Section 337 of the Act.<sup>584</sup> Specifically, we observed that the question of whether the Public Safety Broadband Licensee’s service qualifies as a “public safety service” under Section 337(f)(1) of the Act depends in part on the nature of the spectrum

<sup>577</sup> 47 C.F.R. § 90.523.

<sup>578</sup> 47 C.F.R. § 90.523(e).

<sup>579</sup> 47 C.F.R. §§ 90.523(a)-(d).

<sup>580</sup> *Second Report and Order*, 22 FCC Rcd at 15421 ¶ 373. Specifically, we required that the Public Safety Broadband Licensee satisfy the following eligibility criteria: (1) no commercial interest may be held in this licensee, and no commercial interest may participate in the management of the licensee; (2) the licensee must be a non-profit organization; (3) the licensee must be as broadly representative of the public safety radio user community as possible, including the various levels (e.g., state, local, county) and types (e.g., police, fire, rescue) of public safety entities; and (4) to ensure that the Public Safety Broadband Licensee is qualified to provide public safety services, an organization applying for the Public Safety Broadband License was required to submit written certifications from a total of at least ten geographically diverse state and local governmental entities, with at least one certification from a state government entity and one from a local government entity. See 47 C.F.R. § 90.523(e).

<sup>581</sup> *Second Further Notice*, 23 FCC Rcd at 8060 ¶ 28.

<sup>582</sup> *Second Further Notice*, 23 FCC Rcd at 8060 ¶ 28.

<sup>583</sup> *Second Further Notice*, 23 FCC Rcd at 8060 ¶ 28.

<sup>584</sup> *Second Further Notice*, 23 FCC Rcd at 8060-61 ¶ 29.

use by the entities to which it grants access to the shared broadband network.<sup>585</sup>

316. We further observed that to the extent that these entities are public safety entities that are accessing the shared network to provide themselves with communications services in furtherance of their mission to protect the safety of life, health or property, the Public Safety Broadband Licensee's services related to the public safety broadband spectrum would conform to the statutory definition of "public safety services" and would comport with the Commission's obligation under Section 337(a)(1) of the Act to allocate a certain amount of spectrum to such services.<sup>586</sup> Under this interpretation, only entities providing public safety services, as defined in the Act, would be eligible to use the public safety spectrum of the shared network of the 700 MHz Public/Private Partnership on a priority basis, pursuant to the representation of the Public Safety Broadband Licensee.

317. In arriving at this interpretation, we observed that, under the statutory definition, a service might be considered a "public safety service" even if its purpose is not solely for protecting the safety of life, health or property, so long as this remains its "principal" purpose.<sup>587</sup> Taken a step further, the service provided by the Public Safety Broadband Licensee—providing public safety entities access to the spectrum for safety-of-life/health/property communications operations—could conceivably include the provision of spectrum access to public safety entities for uses that do not principally involve the protection of life, health or property, provided that the principal purpose of the Public Safety Broadband Licensee's services, on the whole, is to protect the safety of life, health or property.<sup>588</sup> We further observed, moreover, that such a literal reading of the statute could permit the Public Safety Broadband Licensee to provide spectrum access to a small number of entities having little or no connection to public safety whatsoever, and potentially result in entire pockets within its nationwide service area served only by such non-public safety entities.<sup>589</sup>

318. Because such a result would appear inconsistent with the spirit of Section 337(f)(1)(A) of the Act, we sought comment on whether, and to what degree, the Public Safety Broadband Licensee would be statutorily precluded by that subsection from representing and allowing any entity to use the network for services that are not principally for public safety purposes.<sup>590</sup> We also sought comment on whether there are other grounds—specifically, the authorization requirement of Section 337(f)(1)(B)(ii) of the Act and/or public interest reasons—for prohibiting the Public Safety Broadband Licensee from providing network access to non-public safety entities or permitting public safety entities that it represents to use the network for services that do not have as their principal purpose the protection of the safety of life, health or property, and instead requiring such non-permitted users, including critical infrastructure industry ("CII") users, to be treated as commercial users who would obtain access to spectrum only through commercial services provided solely by the D Block licensee.<sup>591</sup>

319. Comments. We did not receive any comments with respect to whether we should make minor amendments to Section 90.523 of our rules to: (a) clarify that the services provided through the Public Safety Broadband Licensee must conform to all the elements of the statutory definition of "public safety services;" and (b) clearly delineate the differences and overlap in the respective eligibility requirements of the narrowband licensees, set forth in Sections 90.953(a)-(d) of our rules, and the Public

<sup>585</sup> *Second Further Notice*, 23 FCC Rcd at 8061 ¶ 30.

<sup>586</sup> *Second Further Notice*, 23 FCC Rcd at 8061 ¶ 30.

<sup>587</sup> *Second Further Notice*, 23 FCC Rcd at 8061 ¶ 31 (citing 47 U.S.C. § 337(f)(1)(A)).

<sup>588</sup> *Second Further Notice*, 23 FCC Rcd at 8061 ¶ 31.

<sup>589</sup> *Second Further Notice*, 23 FCC Rcd at 8061-62 ¶ 32.

<sup>590</sup> *Second Further Notice*, 23 FCC Rcd at 8061-62 ¶ 32.

<sup>591</sup> *Second Further Notice*, 23 FCC Rcd at 8061-62 ¶ 32.

Safety Broadband Licensee, set forth in Sections 90.953(e) of our rules to eliminate any ambiguity regarding the applicability of the former to the latter.

320. We did, however, receive a number of comments addressing the question of whether the Public Safety Broadband Licensee should be prohibited both from providing network access to non-public safety entities (*i.e.*, entities that would not be eligible to hold licenses under Section 337 of the Act), and from allowing the public safety entities that it represents to use the network for services that do not have as their principal purpose the protection of the safety of life, health or property. The National Public Safety Telecommunications Council ("NPSTC"), for example, observed that "[t]here are common situations across the country where restoring critical infrastructure — gas, electric, water, transportation or telecommunications — is at least as important as public safety use."<sup>592</sup> On that basis, NPSTC argued that "access [to the shared network] needs to be flexible and managed real-time, allowing the subscribers who are critical to the operation at hand, whatever and whomever that might be, use of required network resources."<sup>593</sup> Under NPSTC's approach, access to the shared network by CII entities (and Federal agencies) "would be directed to emergency circumstances and not general use of the network."<sup>594</sup> Other commenters expressed similar views.<sup>595</sup>

321. A few parties, however, argued a more circumscribed view that eligibility for access to the shared network through the Public Safety Broadband Licensee should be limited to entities that have as their principal purpose the protection of safety of life, health or property. APCO, for example, asserted that "there are significant questions as to whether the Communications Act would allow the PSBL to offer service on public safety spectrum to entities not eligible for public safety spectrum under Section 337 of the Act."<sup>596</sup> Accordingly, APCO suggested that the Commission "should require that the D Block licensee provide CII entities with priority access to the commercial portion of the network (secondary, however, to public safety where relevant) consistent with current CII/wireless carrier agreements."<sup>597</sup> The National Regional Planning Council ("NRPC") asserted that the "principal purpose of the [shared network] spectrum should remain for public safety use [and] the PSBL should provide network access only to public safety entities that have as their principal purpose the protection of safety of life, health or property."<sup>598</sup>

322. Discussion. As a preliminary matter, we tentatively conclude that we should revise Section 90.523 of our rules to: (a) clarify that the services provided through the Public Safety Broadband

---

<sup>592</sup> NPSTC Comments at 17.

<sup>593</sup> NPSTC Comments at 17-18.

<sup>594</sup> NPSTC Comments at 18. NPSTC recommends that the Commission "parallel the core concept of its rules contained in section 90.523. That provision recognizes that critical infrastructure entities that are state or local government agencies may be licensed. It would allow access for Non Government Organizations (NGOs) that have the support of the relevant local or state government agency and the PSBL." *Id.*

<sup>595</sup> See, e.g., AASHTO Comments at 12; PSST Comments at 21; NATOA *et al.* Comments at 13; TDC Comments at 2-3; International Municipal Signal Association, International Association of Fire Chiefs, Inc, Congressional Fire Services Institute, and Forestry Conservation Communications Association Joint Comments at 10; American Hospital Association Comments at 3; Association of Emergency Medical Technicians Comments at 4; Mayo Clinic Comments at 4; City and County of San Francisco Comments at 4 n.3; TeleCommUnity Comments at 10; Ericsson Inc. Comments at 5; District of Columbia Comments at 3; Intelligent Transportation Society of America Reply Comments at 3. Joe Hanna Reply Comments at 4; American Petroleum Institute Reply Comments at 5-7.

<sup>596</sup> Association of Public-Safety Communications Officials-International, Inc. Comments at 8.

<sup>597</sup> Association of Public-Safety Communications Officials-International, Inc. Comments at 9.

<sup>598</sup> National Regional Planning Council Comments at 6. See also International Association of Fire Fighters Comments at 5.

Licensee must conform to all the elements of the statutory definition of "public safety services;" and (b) clearly delineate the differences and overlap in the respective eligibility requirements of the narrowband licensees, set forth in Sections 90.953(a)-(d), and the Public Safety Broadband Licensee, set forth at Section 90.953(e) to eliminate any ambiguity regarding the applicability of the former to the latter. We believe these clarifications would be accomplished through the rule revisions we are proposing (discussed below) to address the issue of eligibility to access the public safety broadband network.

323. With respect to the question of which entities should be eligible to access the public safety broadband network through the Public Safety Broadband Licensee, while we recognize and appreciate the important functions that CII entities can serve in supporting public safety entities during the resolution of emergencies, we tentatively conclude that both statutory limitations and policy considerations preclude CII entities from accessing the public safety broadband network. We propose specific amendments to Section 90.523 of our rules included in Appendix C to this Third Further Notice to effect such tentative conclusion and to effect the general clarifications discussed above.

324. In arriving at our tentative conclusion, we necessarily begin with an analysis of Section 337 of the Act. Section 337(a)(1) requires the Commission to allocate 24 megahertz of spectrum between 746 MHz and 806 MHz for "public safety services."<sup>599</sup> As stated above, the statutory definition of "public safety services," which is set forth in Section 337(f) of the Act, provides as follows:

(f) Definitions – For purposes of this section:

(1) Public Safety Services – The term "public safety services" means services –

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided -

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.<sup>600</sup>

Section 337(f)(1) specifies, among other criteria, that the sole or principal purpose of the service for which the 700 MHz public safety spectrum is used must be to protect the safety of life, health, or property.<sup>601</sup> While CII entities, such as utility companies, may play an important role on occasion supporting public safety entities to carry out their mission of protecting the safety of life, health, or property, this role is ancillary to the entities' principal purposes, such as providing electricity. By way of contrast, with respect to concerns raised by the American Hospital Association and other health care representative associations, we observe that under these proposed amendments, the sole or principal purpose of the communications needs of hospitals and other health care facilities as well as ambulance and Emergency Medical Services involved in the provision of emergency medical care, are innately to protect the safety of life, health, or property.<sup>602</sup> For example, we envision that in providing health care services to the sick or injured, responding to accident scenes, or in addressing public health emergencies

<sup>599</sup> 47 U.S.C. § 337(a)(1).

<sup>600</sup> 47 U.S.C. § 337(f).

<sup>601</sup> 47 U.S.C. § 337(f)(1)(A).

<sup>602</sup> See American Hospital Association Comments at 3; Association of Emergency Medical Technicians Comments at 4; Mayo Clinic Comments at 4.

such as pandemics or poisonous gas exposure, hospitals, health care facilities, and emergency medical service departments would be eligible users of the 700 MHz public safety spectrum.

325. Because CII entities would not be eligible to access the 700 MHz public safety spectrum under Section 337, they also would not be eligible to gain access to this spectrum through the Public Safety Broadband Licensee. Even if authorized by a governmental entity pursuant to Section 337(f)(1)(B)(ii) of the Act, since the sole or principal purpose of the communications of CII entities are not to protect the safety of life, health or property, granting such access to otherwise ineligible CII entities through a *bona fide* eligible entity merely bypasses the separate requirement contained in Section 337(f)(1)(A) of the Act. Permitting the Public Safety Broadband Licensee to provide public safety broadband spectrum access to non-public safety entities also would exceed the carefully prescribed scope of its representation. Specifically, the eligibility criteria for the Public Safety Broadband Licensee requires, among other things, that such licensee be “as broadly representative of the public safety radio user community as possible, including the various levels (e.g., state, local, county) and types (e.g., police, fire, rescue) of public safety entities,” and be certified by at least ten geographically diverse state and local governmental entities whose “primary mission is the provision of public safety services.”<sup>603</sup>

326. We also believe that permitting CII entities to access the 700 MHz public safety spectrum through the Public Safety Broadband Licensee—and thereby access this spectrum on a priority basis—would not be in the public interest. As we observed in the *Second Further Notice*, given the limited amount of spectrum available to the public safety community, and particularly with respect to spectrum allocated for interoperability purposes, there is no margin for awarding priority access to entities that do not have as their sole or principal purpose the protection of the safety of life, health, or property.<sup>604</sup> Permitting CII entities to access the 700 MHz public safety broadband spectrum would significantly dilute the band’s available capacity, because the size of the CII community is relatively much larger than the size of the public safety community itself. We thus believe the public interest would be best served by maximizing broadband spectrum capacity for *bona fide* public safety entities, and maximizing the growth potential for new broadband applications geared towards the needs of the public safety community.<sup>605</sup> In any event, we observe that CII entities may access the shared broadband network on a commercial basis as customers of the D Block licensee(s).

327. To implement our tentative conclusions on the eligibility issues, we are proposing revisions to Section 90.523 of our rules (included in Appendix C hereto). First, we propose to revise the narrowband eligibility criteria to clarify that authorizations to deploy and operate systems in the 769-775 MHz and 799-805 MHz (narrowband) frequency bands are limited to systems the sole or principal use of which is to protect the safety of life, health, or property, and which are not used to provide any service that is made commercially available by the license holder.<sup>606</sup> Second, we propose to add a new provision

<sup>603</sup> 47 C.F.R. § 90.523(e). The scope of the Public Safety Broadband Licensee’s representation also is limited by the requirements pertaining to its Articles of Incorporation, including that they incorporate among its purposes that the Public Safety Broadband Licensee “is to represent the interests of all public safety entities to ensure that their broadband spectrum needs are met in a balanced, fair, and efficient manner, in the interests of best promoting the protection of life and property of the American public.” *Second Report and Order* at ¶ 375.

<sup>604</sup> *Second Further Notice*, 23 FCC Rcd at 8061-62 ¶ 32.

<sup>605</sup> For these same statutory-based and public interest reasons, we do not believe such concerns would be alleviated by permitting CII entities access to the 700 MHz public safety broadband spectrum only on a limited, case-by-case, emergency basis, as administered locally or through the Public Safety Broadband Licensee. See, e.g., The National Association of Telecommunications Officers and Advisors (“NATOA”), the National Association of Counties (“NACo”), the National League of Cities (“NLC”), and the U.S. Conference of Mayors (“USCM”) Joint Comments at 13.

<sup>606</sup> See proposed Section 90.523(a)(1), Appendix A.



setting forth the eligibility criteria for entities seeking to access the public safety broadband network through the Public Safety Broadband Licensee, which criteria incorporates the narrowband eligibility criteria and requires that the sole or principal purpose of such entities must be to protect the safety of life, health, or property.<sup>607</sup> Third, we propose revisions to the Public Safety Broadband Licensee eligibility criteria to ensure that the services provided through the Public Safety Broadband Licensee conform to all the elements of the statutory definition of "public safety services."<sup>608</sup>

328. *Federal Usage of the Public Safety Broadband Network.* With respect to whether we should modify Section 2.103 of the Commission's rules to limit Federal public safety agency use of the public safety broadband spectrum to situations where such use is necessary for coordination of Federal and non-Federal activities,<sup>609</sup> most parties opposed such a specific limitation. The Association of Public-Safety Communications Officials-International, Inc. ("APCO"), for example, asserts that it "supports a provision that would allow Federal public safety use of the broadband network with the concurrence of the PSBL and local public users in the areas in which the Federal government desires to operate on the network."<sup>610</sup> APCO further contends that "[i]n general, Federal public safety use should be encouraged as a means of improving interoperability in emergency response activities, but not at the expense of providing sufficient spectrum capacity for state and local governments."<sup>611</sup>

329. The Public Safety Spectrum Trust Corporation argues that "the FCC should reaffirm the decision adopted in the Second R&O, wherein the PSST was given exclusive authority to approve Federal usage of the PSBL spectrum, a determination that will be made on a case-by-case basis consistent with the PSST's responsibility to promote interoperable public safety communications."<sup>612</sup> The PSST further observes that "Federal users who do not require priority service on the SWBN are free to accept normal commercial service as regular D Block subscribers."<sup>613</sup>

330. Rivada Networks argues, however, that "the Commission should streamline Section 2.103 to allow the most efficient and effective access of the public safety 700 MHz spectrum for Federal agencies that may be called upon to respond in the event of an emergency and coordinate with non-Federal state and local agencies."<sup>614</sup> According to Rivada, "[s]o long as there is 'mutual agreement between the Federal and non-Federal entities' and that agreement includes coordination procedures to protect against interference, Federal use of this spectrum should be presumptively allowed."<sup>615</sup>

331. Discussion. We believe that we should reaffirm the decision adopted in the *Second Report and Order* to grant the PSBL "exercise of sole discretion, pursuant to Section 2.103 of the

<sup>607</sup> See proposed Section 90.523(b), Appendix A.

<sup>608</sup> See proposed Section 90.523(c)(5), Appendix A.

<sup>609</sup> *Second Further Notice*, 23 FCC Rcd at 8092 at ¶ 126.

<sup>610</sup> Association of Public-Safety Communications Officials-International, Inc. Comments at 9.

<sup>611</sup> Association of Public-Safety Communications Officials-International, Inc. Comments at 9. See also National Public Safety Telecommunications Council Comments at 18 ("[t]he 700 MHz public safety broadband network should reflect the much envisioned objective of interoperability across all levels of government during an emergency."); National Regional Planning Council Comments at 6 ("All governmental services, including federal and military, should be eligible.").

<sup>612</sup> Public Safety Spectrum Trust Corporation Comments at 18-19. See also National Public Safety Telecommunications Council Comments at 18; Ericsson, Inc. Comments at 31.

<sup>613</sup> Public Safety Spectrum Trust Corporation Comments at 19.

<sup>614</sup> Rivada Networks Comments at 6.

<sup>615</sup> Rivada Networks Comments at 6.

Commission's rules, whether to permit Federal public safety agency use of the public safety broadband spectrum, with any such use subject to the terms and conditions of the NSA.<sup>616</sup> Our decision in this regard was based upon the Commission's earlier determination that Section 337 of the Act does not bar Federal Government public safety entities from using the 700 MHz band under certain conditions.<sup>617</sup> Specifically, the Commission determined that, while Section 337 of the Act does not expressly indicate that Federal government entities should be eligible, such "omission simply reflects the fact that the Commission does not license Federal stations."<sup>618</sup> We further observed that Federal entities, although ineligible for Commission licensing in the 700 MHz band, already were eligible to receive authorization to use the 700 MHz public safety spectrum in accordance with the requirements set forth in Section 2.103,<sup>619</sup> which the Commission amended to clarify the permitted Federal use of this band.<sup>620</sup> Key to the Commission's determination were its observations, based on the record then before it, that Federal entities provide noncommercial services the sole or principal purpose of which is to protect the safety of life, health, or property, and that allowing Federal entities to access the 700 MHz band is essential to promoting interoperability.<sup>621</sup>

332. We see no reason to disturb the Commission's previous treatment of Federal use of the 700 MHz public safety spectrum. We agree with APCO that "federal public safety use should be encouraged as a means of improving interoperability in emergency response activities,"<sup>622</sup> and that narrowing our existing rules to permit Federal use of the 700 MHz band only for Federal/non-Federal coordination activities would achieve an opposite result. We observe that contrary to PSST's characterization, such authority need not necessarily be exercised only on a case-by-case basis. To this extent, we agree with Rivada that the Public Safety Broadband Licensee may establish more broad-reaching agreements with Federal public safety entities and thus avoid the need for case-by-case determinations in appropriate situations.<sup>623</sup> Accordingly, we tentatively conclude that we will reaffirm our current rules under which the Public Safety Broadband Licensee has exercise of sole discretion, pursuant to Section 2.103 of the Commission's rules, whether to permit Federal public safety agency use of the public safety broadband spectrum, with any such use subject to the terms and conditions of the NSA.

333. *Mandatory Usage of the Public Safety Broadband Network.* In the *Second Further Notice* we asked whether eligible public safety users should be required to subscribe to the shared

<sup>616</sup> See *Second Report and Order*, 22 FCC Rcd at 15427 ¶ 383.

<sup>617</sup> See *Second Report and Order*, 22 FCC Rcd at 15427 ¶ 383 n.822 (citing *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, WT Docket No. 96-86, First Report & Order and Third Notice of Proposed Rulemaking, 14 FCC Rcd 152, 185 ¶ 66 (1998); 47 C.F.R. § 2.103(b)).

<sup>618</sup> *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, WT Docket No. 96-86, First Report & Order and Third Notice of Proposed Rulemaking, 14 FCC Rcd 152, 185 ¶ 66 (1998).

<sup>619</sup> See *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, WT Docket No. 96-86, First Report & Order and Third Notice of Proposed Rulemaking, 14 FCC Rcd 152, 185-86 ¶¶ 67-68 (1998).

<sup>620</sup> See 47 C.F.R. § 2.103(b).

<sup>621</sup> See *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, WT Docket No. 96-86, First Report & Order and Third Notice of Proposed Rulemaking, 14 FCC Rcd 152, 185 ¶ 65 (1998).

<sup>622</sup> Association of Public-Safety Communications Officials-International, Inc. Comments at 9.

<sup>623</sup> See Rivada Networks Comments at 6.

broadband network for service, at reasonable rates, or be subject to some alternative obligation or condition promoting public safety network usage in order to provide greater certainty to the D Block licensee.<sup>624</sup> Among other things, we asked whether we should require the purchase of a minimum number of minutes, and how such obligation might be imposed; whether any such obligation should be conditioned on the availability of government funding for access; and whether we should require public safety users to pay for access with such money.<sup>625</sup>

334. The parties addressing these issues opposed any form of mandatory usage requirements. NPSTC, for example, asserted that, “[s]uch a mandate would be a historic departure from the Commission’s role of leaving such choice to the consumer, public or private.”<sup>626</sup> The International Association of Fire Fighters asserted that “all public safety agencies must be given the flexibility to choose whether or not to participate based on their own unique public safety needs and obligations.”<sup>627</sup> The PSST opposed imposition of a mandatory use or minimum public safety usage requirement on grounds that such concept “is inconsistent with the PSST’s understanding of the FCC’s original Public/Private Partnership arrangement and with the PSST’s belief that network adoption must be entirely voluntary.”<sup>628</sup>

335. The City of Philadelphia added that, “[w]here local governments are required to pay user fees over which they have no control, they must have the option of declining participation in the network where they determine the fees are unaffordable or local budget appropriations do not cover them.”<sup>629</sup> Moreover, the City of Philadelphia observed that, “[m]andating participation in a national network is not in the public interest because it requires local governments to cede control over service and operations and to accept terms that may not meet the specific communications needs of their public safety agencies.”<sup>630</sup> The PSST commented that, “[m]andating public safety use of the network, an option that the PSST does not support, could have the effect of disrupting existing business relationships between commercial operators and public safety organizations.”<sup>631</sup>

336. The National Association of Telecommunications Officers and Advisors (“NATOA”), the National Association of Counties (“NACo”), the National League of Cities (“NLC”), and the U.S. Conference of Mayors (“NATOA *et al*”) argued that “there should be no mandatory requirement that public safety entities use the proposed network, but there must be a requirement that provides for interconnection of existing networks with the new network.”<sup>632</sup>

337. Concerning the availability of government funding for access, the NRPC, for example, argued that “[i]f a local public safety entity elects not to subscribe to the new network, we would request the Commission’s consideration to not develop regulatory rules that impose any obligations on the agency

<sup>624</sup> *Second Further Notice*, 23 FCC Rcd at 8063 ¶ 37.

<sup>625</sup> *Second Further Notice*, 23 FCC Rcd at 8063 ¶ 37.

<sup>626</sup> NPSTC Comments at 15.

<sup>627</sup> IAFF Comments at 5. *See also* NRPC Comments at 4; RPC 33 Comments at 4; Lencioni Comments at 1; TeleCommUnity Comments at 11; Virginia Comments at 7; Verizon Wireless Comments at 10; RPC 20 Reply Comments at 15-16.

<sup>628</sup> PSST Comments at 17-18.

<sup>629</sup> Philadelphia Comments at 6. *See also* NPSTC Comments at 15; Lencioni Comments at 1.

<sup>630</sup> Philadelphia Comments at 6.

<sup>631</sup> PSST Comments at 18. *See also* TE M/A-COM Comments at 9.

<sup>632</sup> NATOA *et al.* Comments at 18.

based on the availability of any government grant monies or any monies, regardless of origin.<sup>633</sup> Finally, APCO and NPSTC, also questioned the Commission's legal authority to impose such a mandate.<sup>634</sup>

338. Discussion. We tentatively conclude not to establish any mandate requiring eligible public safety users to subscribe to the shared broadband network for service, or subject such entities to any other alternative obligations or conditions promoting public safety network usage. Specifically, we are concerned that establishing usage mandates would potentially interfere with local public safety needs and obligations unique to their communities, as well as with existing network investments or business relationships with other vendors and service providers. In addition, any mandatory subscription obligation would be inconsistent with our continued expectation that voluntary participation will be driven by the shared network build undertaken by the D Block licensee(s), resulting state-of-the-art broadband applications, and economies of scale made possible under the public/private partnership approach.<sup>635</sup>

## 2. Provisions Regarding the Public Safety Broadband Licensee

### a. Non-Profit Status

339. Background. Among other criteria for eligibility to hold the Public Safety Broadband License that we established in the *Second Report and Order*, we provided that no commercial interest may be held in the Public Safety Broadband Licensee, that no commercial interest may participate in the management of the licensee, and that the licensee must be a non-profit organization.<sup>636</sup> We also indicated, however, that, as part of its administration of public safety access to the shared wireless broadband network, the Public Safety Broadband Licensee might assess "usage fees to recoup its expenses and related frequency coordination duties."<sup>637</sup>

340. In the *Second Further Notice*, we sought to further examine the Public Safety Broadband Licensee's non-profit status, and issues related to alternative funding mechanisms, including excess revenue derived from any access fees that the Public Safety Broadband Licensee might charge. With respect to the requirement that the Public Safety Broadband Licensee be organized as a non-profit organization, in the *Second Further Notice*, we sought comment as to whether we should specify that the Public Safety Broadband Licensee and all of its members (in whatever form they may hold their legal or beneficial interests in the Public Safety Broadband Licensee) must be non-profit entities.<sup>638</sup> While we acknowledged that the Public Safety Broadband Licensee may need to contract with attorneys, engineers, accountants, and other similar advisors or service providers to fulfill its responsibilities to represent the interests of the public safety community, we asked whether the Commission should restrict the Public Safety Broadband Licensee's business relationships pre- and post-auction with commercial entities, and if so, what relationships should and should not be permitted.<sup>639</sup>

341. We also sought comment as to whether we should clarify that the Public Safety Broadband Licensee may not obtain debt or equity financing from any source, unless such source is also a

<sup>633</sup> NRPC Comments at 4. See also APCO Comments at 13 (arguing that the Commission lacks authority to require "use of the public safety broadband network [as] a condition of government funding.").

<sup>634</sup> See APCO Comments at 13; NPSTC Comments at 15.

<sup>635</sup> See, e.g., *Second Report and Order*, 22 FCC Rcd at 15431 ¶ 396.

<sup>636</sup> See *Second Report and Order*, 22 FCC Rcd at 15421 ¶ 421.

<sup>637</sup> *Id.* at 15426 ¶ 383.

<sup>638</sup> *Second Further Notice*, 23 FCC Rcd at 8064 ¶ 40.

<sup>639</sup> *Second Further Notice*, 23 FCC Rcd at 8064 ¶ 40.

non-profit entity.<sup>640</sup> We asked whether such a restriction would be warranted to ensure that the Public Safety Broadband Licensee is not unduly influenced by for-profit motives or outside commercial influences in carrying out its official functions.<sup>641</sup> We also sought comment on ways to allow necessary financing while still ensuring the independence of the Public Safety Broadband Licensee, such as whether to allow working capital financing from commercial banks and whether to restrict the assets of the Public Safety Broadband Licensee that can be pledged as security for such loans, and/or whether there are other types of loans or alternative funding sources that we should allow the Public Safety Broadband Licensee to employ.<sup>642</sup>

342. As a separate line of inquiry, we sought comment in the *Second Further Notice* on the best way to fund the Public Safety Broadband Licensee's operations. We asked, for example, whether the D Block licensee should be required to pay the Public Safety Broadband Licensee's administrative costs and, if so, whether such obligation should be capped.<sup>643</sup> Assuming government-allocated funding were available, we asked whether such funding mechanisms would be the best solution for funding the Public Safety Broadband Licensee.<sup>644</sup> We further asked whether the Commission has legal authority to support the Public Safety Broadband Licensee's operational expenses through the Universal Service Fund<sup>645</sup> or Telecommunications Development Fund,<sup>646</sup> and whether such approaches would be appropriate.<sup>647</sup>

343. We also sought comment on whether any excess revenue generated by the fees or other sources of financing obtained by the Public Safety Broadband Licensee from non-profit entities should be permitted and, if so, how they should be used.<sup>648</sup> We asked, for example, whether the Public Safety Broadband Licensee should be permitted to hold a certain amount of excess income as a reserve against possible future budget shortfalls or whether such excess income should instead be used for the direct benefit of the public safety users of the network, such as for the purchase of handheld devices.<sup>649</sup> Finally, we sought comment on whether the Public Safety Broadband Licensee may legitimately incur certain reasonable and customary expenses incurred by a business, consistent with the constitution of the Public Safety Broadband Licensee and the nature of its obligations as established by the Commission.<sup>650</sup>

344. Comments. We received comments on most of the issues raised in the *Second Further Notice*, as broken out below.

**(i) Clarifying the Public Safety Broadband Licensee's Non-Profit Status.**

345. Only a few commenters addressed the question of clarifying the Public Safety Broadband Licensee's non-profit status. NATOA endorsed requirements that "no commercial interest may be held in the Public Safety Broadband Licensee, that no commercial interest may participate in the management of

<sup>640</sup> *Second Further Notice*, 23 FCC Rcd at 8064-65 ¶ 41.

<sup>641</sup> *Second Further Notice*, 23 FCC Rcd at 8064-65 ¶ 41.

<sup>642</sup> *Second Further Notice*, 23 FCC Rcd at 8064-65 ¶ 41.

<sup>643</sup> *Second Further Notice*, 23 FCC Rcd at 8065 ¶ 42.

<sup>644</sup> *Second Further Notice*, 23 FCC Rcd at 8065 ¶ 42.

<sup>645</sup> See, e.g., 47 U.S.C. § 254(c)(1), (h).

<sup>646</sup> See, e.g., 47 U.S.C. § 614.

<sup>647</sup> *Second Further Notice*, 23 FCC Rcd at 8065 ¶ 43.

<sup>648</sup> *Second Further Notice*, 23 FCC Rcd at 8065-66 ¶ 44.

<sup>649</sup> *Second Further Notice*, 23 FCC Rcd at 8065-66 ¶ 44.

<sup>650</sup> *Second Further Notice*, 23 FCC Rcd at 8066 ¶ 45.

the licensee, and that the licensee must be a non-profit organization.”<sup>651</sup> AT&T and others asserted that the Commission should ensure “that the PSBL must be a nonprofit entity that will use the network solely for public safety purposes.”<sup>652</sup> TeleCommUnity argued that “in addition to the public policy argument that favors the requirement that the [PSBL] be a non-profit organization, there could be an argument that Section 337 of the Act requires that the Licensee be so.”<sup>653</sup>

346. Discussion. We agree with commenters who argue that the Public Safety Broadband Licensee should remain a non-profit entity and see no reason at this time to alter the non-profit status of the Public Safety Broadband Licensee. As discussed in the following paragraphs and elsewhere in this Third Further Notice, we are proposing significant steps to insulate the Public Safety Broadband Licensee from undue commercial influence, and additional reporting and auditing requirements to provide greater oversight of the Public Safety Broadband Licensee’s activities. We believe these changes should further clarify the non-profit requirement of the Public Safety Broadband Licensee.

(ii) **Restrictions on PSBL Business Relationships.**

347. With respect to the question of restricting the Public Safety Broadband Licensee’s business relationships pre- and post-auction with commercial entities generally, the record reflects mixed views. The PSST asserted that “the current restrictions regarding its agent/advisor relationships are more than adequate to prevent improper commercial influence, and the FCC should not place additional restrictions on the PSST’s business relationships and its agent/advisor relationships.”<sup>654</sup> Instead, the PSST argued, “the Commission should provide greater clarity regarding its restriction on ‘commercial interests’ participating in management of the license.”<sup>655</sup> The PSST observed that the current rules governing the PSBL “allow for arrangements with third parties to assist with the management or operation of the public safety-side of the network,” which arrangements the PSST asserted “are invaluable for a variety of reasons, including access to expertise and funding, in assisting the PSST to do its job effectively.”<sup>656</sup>

348. The PSST further indicated that while “there have been abuses in the past involving impermissible relationships between licensees and third parties that would cause the FCC to adopt [] prophylactic measures,” it is also important “that the FCC not so restrict the PSBL in its ability to contract for needed services that it is prevented from fulfilling the very functions that the FCC has determined need to be undertaken on behalf of public safety.”<sup>657</sup> In this regard, the PSST added that it “has a strong preference for outsourcing services to others where practical and appropriate, thereby avoiding the need for a large internal staff with associated employer obligations.”<sup>658</sup> The PSST further argued that “provision of management services or other types of support that are consistent with [the] *Intermountain Microwave* or *Motorola* [standards for *de jure* and *de facto* control] and would not involve prohibited

<sup>651</sup> NATOA *et al.* Comments at 14-15 (internal footnote omitted).

<sup>652</sup> AT&T Comments at 19, 21. *See also* Eads Comments at 1; Lencioni Comments at 2; Philadelphia Comments at 5.

<sup>653</sup> TeleCommUnity Comments at 11.

<sup>654</sup> PSST Comments at 49.

<sup>655</sup> PSST Comments at 49.

<sup>656</sup> PSST Comments at 49.

<sup>657</sup> PSST Comments at 49.

<sup>658</sup> PSST Comments at 50.

economic interests should be permitted under 'incentive-compatible' standards."<sup>659</sup> In addition, the PSST argued that "any new 'incentive-compatible' rules must not unduly restrict the PSST's ability to obtain funding, so long as there is no commercial interest participating in management of the licensee."<sup>660</sup>

349. Finally, the PSST states that its "engagement of Cyren Call is consistent with those FCC requirements."<sup>661</sup> The PSST explained that "[b]ecause it had no governmental or other funding or assets to serve as collateral for a commercial loan, [it] obtained a deferral from Cyren Call of amounts due, and even obtained an advance loan from Cyren Call that reflects arm's-length, normal commercial terms."<sup>662</sup> The PSST asserts, however, that "Cyren Call has no management relationship with or management role within the PSST, has no legal or beneficial interest in the PSST, and does not participate in the PSST's management."<sup>663</sup> The PSST further asserts that "[t]here are no conditions, covenants or other features of Cyren Call's service agreement with or loan to the PSST that would allow Cyren Call to influence the PSST's policy or management determinations."<sup>664</sup> Cyren Call stated that its arrangements with the PSST did not provide it "with any measure of control or undue influence over the PSST's activities or its decision making process."<sup>665</sup>

350. NPSTC asserted that the "experience and expertise in deploying and operating wireless communications is a narrow field" and, thus, "the PSBL should have the ability to select its advisors to discharge its duties effectively."<sup>666</sup> APCO, however, noted that "the Commission should require that the PSBL adopt strict conflict of interest requirements that include prohibiting its advisors from engaging in business activities resulting from the advice provided to the PSBL [and] from establishing business relationships with equipment vendors, service providers, and others with a financial interest in the decisions of the PSBL."<sup>667</sup> Further, as explained more fully below, some commenters expressed concerns regarding the propriety of permitting the PSBL to be funded by any of its for-profit advisors.

351. Discussion. We agree with APCO that we should subject the Public Safety Broadband Licensee and its advisors, agents, and managers to strict conflict of interest requirements. We believe safeguards should be implemented to ensure that no entity is able to influence the Public Safety Broadband Licensee's pre-auction activities in a manner that might benefit that entity's, or a related entity's, plans to participate in the upcoming D Block auction, or to gain any advantage as compared to other bidders by virtue of information obtained from the Public Safety Broadband Licensee during the course of its relationship with the Public Safety Broadband Licensee. Thus, we tentatively conclude that we should adopt conflict of interest requirements making entities that are serving as advisors, agents, or managers (or their related entities, including affiliates and those controlled by any officer or director of such an entity) of the PSBL ineligible to become a D Block licensee unless such an applicant completely severs its business relationship with the Public Safety Broadband Licensee no later than 30 days

---

<sup>659</sup> PSST Comments at 50 (citing *Intermountain Microwave*, 12 FCC 2d 559 (1963); Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems, File Nos. 507505 *et al.*, Order (issued July 30, 1985) (Private Radio Bureau)).

<sup>660</sup> PSST Comments at 50.

<sup>661</sup> PSST Comments at 50-51.

<sup>662</sup> PSST Comments at 51.

<sup>663</sup> PSST Comments at 51.

<sup>664</sup> PSST Comments at 51.

<sup>665</sup> Cyren Call Reply Comments at 6.

<sup>666</sup> NPSTC Comments at 21. See also Hanna Reply Comments at 2; NASEMSO Reply Comments at 2.

<sup>667</sup> APCO Comments at 17.

following the release date of an order adopting final rules in this proceeding.<sup>668</sup> For purposes of this eligibility rule, we propose to define the terms officer, director, and affiliate in the same manner as those terms are currently defined in Section 1.2110(c) of the Commission's rules, which govern competitive bidding, relating to designated entity eligibility because we have found those definitions effective when assessing relationships among parties related to an applicant.<sup>669</sup> We seek comment on this tentative conclusion and proposed rule.

352. We also tentatively conclude that we should adopt conflict of interest requirements requiring entities that are serving as advisors, agents, or managers (or their related entities, including affiliates and those controlled by any officer or director of such an entity) of the PSBL from establishing business relationships or otherwise being affiliated with, or holding a controlling interest in, equipment vendors, service providers, or other entities that have a direct financial interest in the decisions of the PSBL.<sup>670</sup> These requirements would apply to both pre-auction and post-auction activities. We seek comment on this tentative conclusion and proposed rule.

353. We do not believe that the regulations we propose today will interfere with the Public Safety Broadband Licensee's ability to discharge its duties effectively. We also consider it necessary to implement regulations in order to prevent impropriety and/or the appearance of impropriety in the Public Safety Broadband Licensee's discharge of its duties. We agree with the PSST on the necessity of avoiding regulations that overly restrict the Public Safety Broadband Licensee's ability to engage in necessary transactions with third parties. We believe that the requirements we propose here strike the appropriate balance between providing the Public Safety Broadband Licensee with the flexibility it requires to utilize expert advisors, agents, and managers, and to make necessary contracts with third parties, while ensuring that the Public Safety Broadband Licensee's decisions are insulated from potential undue influences.

### (iii) Funding of the PSBL Through the D Block Licensee.

354. With respect to funding the PSBL through the D Block licensee, there was support for such action, in various forms, including via an upfront payment as well as through recurring payments, such as in the form of a spectrum lease fee. The PSST stated that, as a non-profit, tax-exempt organization subject to IRS rules, the PSST "will need to charge usage fees to public safety users, and it will need to obtain a lease payment from the D Block licensee."<sup>671</sup> The PSST added that "[b]ecause the bulk of the spectrum likely will be used by the D Block licensee to provide services from which it expects to realize a profit, the PSST believes it logically should obtain most of its funding from the lease payment."<sup>672</sup> The PSST, however, acknowledged that "there must be an appropriate balance of public safety fees paid for SWBN usage and a D Block spectrum lease payment," which the PSST argued should be evaluated, along with related issues, and addressed in the NSA.<sup>673</sup>

355. APCO asserted that, lacking conventional forms of security, it will be difficult for the PSBL to obtain debt financing and, therefore, an FCC rule provision "that a specific dollar amount must

<sup>668</sup> In this regard, we note that Cyren Call currently has an outstanding loan extended to the PSST. We seek comment on whether Cyren Call should be allowed to remain a creditor of the PSST if it wishes to be eligible to become a D Block licensee.

<sup>669</sup> See 47 C.F.R. § 1.2110(c).

<sup>670</sup> For purposes of defining "affiliated" and "controlling interest," we propose to use the definitions contained at 47 C.F.R. § 1.2110(c).

<sup>671</sup> PSST Comments at 23-24.

<sup>672</sup> PSST Comments at 23-24.

<sup>673</sup> PSST Comments at 24.



be made available by the D Block licensee to the PSBL to pay back loans obtained from financial institutions to provide operational funds" would be appropriate.<sup>674</sup> APCO further suggested "requiring the D Block licensee to establish a trust fund with a specified dollar amount that the PSBL would be allowed to draw from and pay its operating expenses ... provided there is a clearly established and supported operating budget."<sup>675</sup> APCO stated that the Commission should continue to require that the D-Block winner pay a spectrum lease fee to the Public Safety Broadband Licensee as part of the NSA, but asked the Commission to provide "some further definition ... to provide auction participants with greater certainty," and also stated that a "fee cap may also be appropriate."<sup>676</sup>

356. The NRPC stated that the "D Block licensee should be required to pay all costs identified as necessary with regard to the [PSBL's] administrative costs."<sup>677</sup> In the context of its revised plan for implementing a shared broadband network, Televate proposed that the "D Block winner provides billing services to the public safety community and collects a service fee, per line, to fund PSST baseline operations."<sup>678</sup>

357. Both the PSST and APCO asserted that the PSBL should be allowed to obtain a lease payment from the D Block licensee to cover the PSBL's operational funding.<sup>679</sup> NENA stated that "in the absence of government funding for the public safety broadband licensee, the licensee must be permitted to generate revenues to ensure its viability."<sup>680</sup> AT&T asserted that the "Commission must promulgate guidelines that address the spectrum usage fees the PSBL may charge commercial partners for access to 700 MHz public safety broadband spectrum," and these guidelines "should clarify that any lease agreements be negotiated using commercial practices for cost recovery for the PSBL."<sup>681</sup> AT&T urged that these guidelines "address how charges for network usage and spectrum access will be structured."<sup>682</sup>

358. With respect to excess revenues, the PSST stated that "there would be nothing improper in the PSST undertaking an activity that might generate revenue that exceeded its expenses, provide the activity was in furtherance of public safety interests."<sup>683</sup> APCO suggested that "all funds generated through spectrum lease fees in excess of those deemed appropriate to cover the operating expenses of the PSBL be held in trust with a not-for-profit foundation [from which] public safety users have the ability to apply for grant funding ... to be used to cover the cost of equipment, devices, and any operating fees associated with the use of the nationwide broadband network."<sup>684</sup> APCO also asked the Commission not to "impose any arbitrary restrictions on [any] excess revenues ... of the PSBL."<sup>685</sup> APCO did, however,

---

<sup>674</sup> APCO Comments at 18.

<sup>675</sup> APCO Comments at 18.

<sup>676</sup> APCO Comments at 18. However, APCO warned against the D-Block winner directly paying the PSBL's expenses "as that would create potential conflicts of interest." *Id.*

<sup>677</sup> NRPC Comments at 5.

<sup>678</sup> Televate Comments at 13.

<sup>679</sup> See PSST Comments at 23-24; APCO Comments at 18.

<sup>680</sup> NENA Comments at 4-5.

<sup>681</sup> AT&T Comments at 19.

<sup>682</sup> AT&T Comments at 19. AT&T argued that the lack of this information "was a factor cited as contributing to the failed D Block auction." *Id.*

<sup>683</sup> PSST Comments at 22.

<sup>684</sup> APCO Comments at 18-19.

<sup>685</sup> APCO Comments at 19.

indicate support for Commission oversight of the PSBL's use of any excess revenues.<sup>686</sup> Region 33 states that any excess revenues should "be used to offset operating expenses with the remainder going toward infrastructure improvements."<sup>687</sup> Region 33 also adds "limiting the amount of time excess funds can be retained" would allow use of excess income as a reserve against possible future budget shortfalls, but also provide funding for "improvements to infrastructure or general rate reductions for users."<sup>688</sup>

359. Discussion. We agree with commenters that it is reasonable for the D Block licensee(s) to cover the Public Safety Broadband Licensee's administrative and operating expenses. The Public Safety Broadband Licensee's non-profit status as discussed above and our related concerns that no entangling financial relationships compromise its core mission of representing the public safety community point to establishing a direct funding mechanism between the D Block licensee(s) and the Public Safety Broadband Licensee. Further, we find merit in ensuring that the administrative and operating expenses of the Public Safety Broadband Licensee are finely tuned to its core mission and fully transparent to key stakeholders. Thus, we tentatively conclude that the Public Safety Broadband Licensee shall establish an annual budget and submit this budget to the Chief, WTB and Chief, PSHSB, on delegated authority, for approval. The proposed annual budget to be submitted by the Public Safety Broadband Licensee would enable the Commission to ensure that the Public Safety Broadband Licensee is acting in a fiscally responsible manner and not engaging in activities that exceed the scope of its prescribed roles and responsibilities. The Public Safety Broadband Licensee already is required to submit a full financial accounting on a quarterly basis,<sup>689</sup> which helps serve the same purpose. As an additional measure, the PSBL also would need to have an annual audit conducted by an independent auditor. In addition, we are proposing to provide that the Commission reserves the right, as delegated to the Chief, PSHSB, to request an audit of the Public Safety Broadband Licensee's expenses at any time.

360. With respect to the mechanism of funding of the Public Safety Broadband Licensee, we tentatively conclude that the nationwide D Block licensee or, if the D Block is licensed on a regional basis, each regional D Block licensee, will make an annual payment to the Public Safety Broadband Licensee of, in the aggregate, the sum total of \$5 million per year. These payments would be in consideration for the D Block licensee(s)' leased access on a secondary basis to the public safety broadband spectrum. In the event that the D Block is licensed on a regional basis, the Commission will specify after the close of the auction the annual payments required for each license won at auction, such that the total \$5 million in annual payments to the Public Safety Broadband Licensee is apportioned on a per region basis, based upon total pops per region. Because these figures are tied to the regional D Block licenses actually won at auction, the Commission may adjust them to account for any regional D Block licenses that may go unsold in the next D Block auction but which are successfully reaucted on a subsequent date. The annual payment funds will be placed into an escrow account managed by an unaffiliated third party, such as a major commercial financial institution, for the benefit of the Public Safety Broadband Licensee. We will require the Public Safety Broadband Licensee to seek approval of its selected escrow account manager from the Chief, PSHSB. The Public Safety Broadband Licensee would draw funds on this account to cover its annual operating and administrative expenses in a manner consistent with its submitted annual budget for that fiscal year.<sup>690</sup> The entirety of the Public Safety Broadband Licensee's annual operating budget shall be based on these annual payments. We seek comment on these tentative conclusions and proposals, including when the D Block licensee(s) should

<sup>686</sup> APCO Comments at 19.

<sup>687</sup> RPC 33 Comments at 6.

<sup>688</sup> RPC 33 Comments at 6.

<sup>689</sup> See 47 C.F.R. § 90.528(g).

<sup>690</sup> In the event that the PSST continues to serve as the PSBL, it may, as part of its first submitted annual budget, account for its administrative and operational expenses to date.

make their initial payment to the Public Safety Broadband Licensee. Specifically, comment is requested *on whether the D Block licensee(s) should make funding available prior to the commencement of the NSA negotiation process.* As a related matter, we also seek comment on when we should first require the Public Safety Broadband Licensee to develop its first annual budget, and when we should require the independent audit.

361. To the extent that the Public Safety Broadband Licensee's actual operating expenses for a given fiscal year turn out to be less than its proposed budget, such that there are excess funds left over at the end of that fiscal year from the annual payment(s) made by the D Block licensee(s) at the beginning of that year, those excess funds would be applied towards the Public Safety Broadband Licensee's funding of administrative or operational expenses for the following fiscal year, or to fund secondary activities, such as the purchase of equipment for the benefit of individual public safety agencies. We expect that the various reporting and auditing requirements will provide the Commission with sufficient ability to ensure that the Public Safety Broadband Licensee's expenses are reasonable and that it is operating within the scope of its prescribed role and responsibilities.<sup>691</sup>

362. Finally, in light of the funding mechanism we propose above, we tentatively conclude that we will not permit the Public Safety Broadband Licensee to charge a separate lease fee to the D Block licensee(s) for their use of the public safety broadband spectrum. As noted elsewhere, given the funding mechanism we are tentatively proposing above, we also are tentatively proposing not to permit the Public Safety Broadband Licensee to obtain loans or financing from any other sources.

**(iv) Funding of the PSBL Through the Federal Government.**

363. Commenters generally questioned the legality of funding the Public Safety Broadband Licensee's operations through the Universal Service Fund ("USF") and/or Telecommunications Development Fund ("TDF"). APCO, for example, asserted that from a "public policy perspective, there is much to support using USF" to support the PSBL, but noted "potential legal issues" in that the PSBL is not a common carrier.<sup>692</sup> NPSTC observed that the "revenue base of [the USF and TDF] is already subject to varying constraints and demands, if not controversy," concluding that "[t]he risks associated with these alternatives appears to outweigh any potential benefit."<sup>693</sup>

364. With respect to other sources of Federal funding for the PSBL, many commenters supported such action, noting Congresswoman Jane Harmon's proposed legislation<sup>694</sup> to achieve this result.<sup>695</sup> NATOA, for example, asserted that "government funding of the PSBL is the best option to preserve the licensee's independence from commercial interests."<sup>696</sup>

365. Spectrum Acquisitions proposed a revised band plan leading to increased D Block spectrum which, when auctioned, could "provide additional funds to be transferred to the PSST."<sup>697</sup>

---

<sup>691</sup> As discussed elsewhere, we propose certain limitations on the role and responsibilities of the Public Safety Broadband Licensee, which should lead to significantly decreased expenses than what may have originally been envisioned by the PSST.

<sup>692</sup> APCO Comments at 19. *See also* PSST Comments at 25. However, the PSST does recommend use of the USF and TDF to fund the D Block licensee's activities. *Id.*

<sup>693</sup> NPSTC Comments at 20-21.

<sup>694</sup> *See* Public Safety Broadband Authorization Act of 2008, H.R. 6055, 110<sup>th</sup> Cong. (2008).

<sup>695</sup> *See* AT&T Comments at 21; Philadelphia Comments at 5; NRPC Comments at 5; TeleCommUnity Comments at 12; RPC 33 Comments at 5; RPC 20 Reply Comments at 18.

<sup>696</sup> NATOA *et al.* Comments at 15.

<sup>697</sup> SAI Comments at 13.

Hanna suggested using "revenues generated from pending auctions, to provide a funding stream to all the PSST/PSBL to operate in an independent and transparent manner."<sup>698</sup> The IAFF suggested establishment of "a grant program to fund the administrative and operational costs of the public safety licensee, thus eliminating the need for the public safety licensee to procure such funding from for-profit entities."<sup>699</sup>

366. Discussion. As an initial matter, we do not believe that the USF or TDF funding programs are appropriate for funding the Public Safety Broadband Licensee's operations. In the case of USF, we observe that the USF program ultimately is intended to fund actual services, whereas the context for exploring USF funding in this proceeding is to fund the day-to-day administrative operations of the Public Safety Broadband Licensee.<sup>700</sup> Moreover, USF funding is limited to "eligible telecommunications carriers" ("ETC"),<sup>701</sup> and as the PSST observes, to be designated as an ETC, the Public Safety Broadband Licensee "would need to be a common carrier, which it is not and cannot become."<sup>702</sup>

367. With respect to the TDF, as currently constituted, this program appears inappropriate for funding the Public Safety Broadband Licensee's operations. Congress established the TDF in Section 707 of the Telecommunications Act of 1996<sup>703</sup> as a mechanism to promote access to capital for small businesses in the telecommunications industry, stimulate the development of new technology, and support delivery of universal service.<sup>704</sup> The TDF, a non-profit corporation, essentially functions as a venture capital fund, making loans to "eligible small business[es]" based upon business plans and related considerations.<sup>705</sup> As such, the TDF takes equity positions in the companies that seek its assistance, and makes funding decisions largely based upon the business case of the potential borrower, both of which are inapposite to the non-profit status of the Public Safety Broadband Licensee and its operations. Moreover, since the TDF program is a statutory entity with no implementing FCC regulations, accommodating the funding of the Public Safety Broadband Licensee by the TDF would require legislation.

368. Regarding commenters' other suggested sources for Federal funding of the PSBL, while we agree that government funding of the PSBL may well be the best option to preserve the licensee's independence from commercial interests, we note that we have no control over Congressional disbursement of funds. Moreover, the use of auction revenues or Federal grants for the purpose of funding the PSBL would also require Congressional legislation.

**(v) Restrictions on Financing.**

369. With regard to the issue of implementing restrictions on financing that would facilitate necessary funding while still ensuring the independence of the Public Safety Broadband Licensee, the comments again reflected mixed views.

<sup>698</sup> Hanna Reply Comments at 2-3.

<sup>699</sup> IAFF Comments at 3.

<sup>700</sup> See, e.g., 47 U.S.C. § 254(c)(1) ("In general.— Universal service is an evolving level of telecommunications services . . .") (*emphasis added*); 47 U.S.C. § 254(e) ("A carrier that receives [USF] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.").

<sup>701</sup> See 47 U.S.C. § 254(e).

<sup>702</sup> PSST Comments at 25 (*citing* 47 U.S.C. § 214(e)).

<sup>703</sup> Pub. L. No. 104-104, § 707, 110 Stat. 56, 47 U.S.C. § 614.

<sup>704</sup> See 47 U.S.C. § 614(a).

<sup>705</sup> See 47 U.S.C. § 614(f). TDF funds may only be used for: "the making of making of loans, investments, or other extensions of credits to eligible small businesses"; provision of financial advice to "eligible small businesses"; conducting research; paying the TDF's operating expenses; and "other services" consistent with the TDF's purposes. See 47 U.S.C. § 614(e).

370. The PSST stated that in its early years of operation it "likely will need to borrow money" and the Commission "should continue to allow the PSBL to secure ordinary commercial loans at reasonable rates."<sup>706</sup> The Virginia Fire Chiefs stated that if "neither Congress nor FCC can provide ... funding, it should not deny the PSST the ability to fund itself using methods commonly in use by other non-profit entities."<sup>707</sup> AASHTO supported the "Commission's concern [that] the holder of the PSBL is representative of all public safety groups," but urged the Commission to "strongly consider if the imposition of any additional conditions, mandates, or restrictions place on one not-for-profit licensee would apply equally to all other not-for-profit licensees."<sup>708</sup> AASHTO further argued that "[i]mposition of FCC regulations above those requirements of the [IRS] only obfuscate the issue and do not add clarity or transparency."<sup>709</sup>

371. APCO argued that "[e]quity funding from any sources should be prohibited, as that would undermine the independence and non-profit status of the PSBL."<sup>710</sup> APCO further asserted that "the PSBL must have the ability to seek debt financing (*i.e.*, loans) to fund its operations, and those loans would almost certainly need to be from banks or other "for profit" institutions."<sup>711</sup> NATOA argued that the PSBL should not be allowed to "obtain debt or equity financing from any source ... unless such source is also a non-profit entity."<sup>712</sup> Peha asserted that prohibiting the PSBL from accepting funds from for-profit entities "is a useful restriction, but not a sufficient restriction," because some entities might qualify as non-profit yet have missions that would make it "problematic if they funded the PSBL."<sup>713</sup> Accordingly, Peha argued that the funding "should come from a source whose unambiguous objective is either to serve the public interest, or to serve public safety."<sup>714</sup>

372. As indicated above, commenters also opposed allowing the PSBL to obtain funding from any of its agent/advisors. APCO, for example, contended that the "agent/advisor's funding of the PSST and the resulting debt creates at least a perception that the agent/advisor could exert undue influence over the PSST."<sup>715</sup> APCO further contended that such funding scenario "imposes a financial burden that could interfere with the PSST's mission."<sup>716</sup> Accordingly, APCO asserted that "the Commission's rules should prohibit the PSBL from borrowing funds from entities that provide substantial services to the PSBL."<sup>717</sup>

373. Peha espoused a similar view, noting that by obtaining funding from its advisor, "the PSST has probably lost the option of choosing a new advisor if it is ever unhappy with the current one ..."<sup>718</sup> Peha observed that where the PSBL's advisor also loans money to the PSBL, the advisor then "has

<sup>706</sup> PSST Comments at 23 n. 48.

<sup>707</sup> Virginia Fire Chiefs Comments at 2. *See also* RPC 33 Comments at 7; NPSTC Comments at 21; Northrop Grumman Comments at 12; NAEMT Comments at 3-4; AASHTO Comments at 14.

<sup>708</sup> AASHTO Comments at 7.

<sup>709</sup> AASHTO Comments at 8.

<sup>710</sup> APCO Comments at 17.

<sup>711</sup> APCO Comments at 17.

<sup>712</sup> NATOA *et al.* Comments at 15. *See also* Philadelphia Comments at 5.

<sup>713</sup> Peha Comments at 10.

<sup>714</sup> Peha Comments at 10.

<sup>715</sup> APCO Comments at 17.

<sup>716</sup> APCO Comments at 17.

<sup>717</sup> APCO Comments at 17. *See also* APCO Comments at 17-18 ("[An] appropriate provision would be to prohibit debt financing from any entity that provides services to or otherwise has business relationships with the PSBL.").

<sup>718</sup> Peha Comments at 9-10.

a great deal to lose if the PSBL is unable to reach agreement with a commercial provider, as the loan will never be repaid," but "has nothing to lose if the PSBL reaches an agreement that fails to meet the needs of a single public safety organization."<sup>719</sup> Verizon Wireless argued that a single entity that both loans money and serves as an advisor to the PSBL "raises issues concerning potential conflicts," and that, in such instances, the Commission "should take steps to ensure that the no-commercial-profit principal is not violated."<sup>720</sup>

374. Discussion. As indicated above, we are proposing that funding for the Public Safety Broadband Licensee's operational and administrative costs would come through the annual payment to the Public Safety Broadband Licensee of one percent of the amount of the D Block licensee's gross winning bid, but not to exceed the sum of \$5 million per year. We believe this funding mechanism will make it unnecessary for the Public Safety Broadband Licensee to seek third party loans to fund start-up and ongoing operations. Thus, we propose to clarify that the Public Safety Broadband Licensee may not obtain debt or equity financing from any source. As commenters point out, the independence of the Public Safety Broadband Licensee may be unduly influenced by for-profit motives or outside commercial influences in carrying out its official functions were it allowed to enter into financing agreements with third party, for profit entities. For similar reasons, we propose to prohibit the acquisition of any financing, whether debt or equity, from Public Safety Broadband Licensee agents, advisors or any entity that provides services to the Public Safety Broadband Licensee.<sup>721</sup> Further, we remain concerned that any financial arrangement beyond those described below with respect to funding from the D Block licensee(s) would impose a financial burden that could compromise the functioning and mission of the Public Safety Broadband Licensee. Thus, we propose to prohibit the Public Safety Broadband Licensee from entering into any financial arrangements with third party, non-profit entities for the purpose of securing funding.

**b. Fees for Services Provided to Public Safety Entities**

375. Background. In the *Second Report and Order*, we provided guidance concerning the service fees that the D Block licensee could charge public safety users for their access to and use of the public safety broadband network and, in times of emergency, to the D Block spectrum.<sup>722</sup> We also discussed the importance of the D Block licensee's ability to offer commercial services using the public safety broadband spectrum leased from the Public Safety Broadband Licensee.<sup>723</sup>

376. We required that all service fees – including service fees that the D Block licensee would charge public safety users for normal network service using the public safety broadband spectrum and for their priority access to the D Block spectrum – be specified in the Network Sharing Agreement.<sup>724</sup> We encouraged the parties to negotiate a fee agreement that incorporates financial incentives for the D Block licensee based on the number of public safety entities and localities that subscribe to the service.<sup>725</sup> We also observed that, for the negotiation of reasonable rates, typical commercial rates for analogous services might be useful as a guide, but that the negotiated rates may in fact be lower than typical commercial rates

---

<sup>719</sup> Peha Comments at 10.

<sup>720</sup> Verizon Wireless Comments at 34. See also AT&T Comments at 19, 21; IAFF Comments at 3; RPC 20 Reply Comments at 17; Verizon Wireless Reply Comments at 23-26.

<sup>721</sup> We include any equipment manufacturer financing to support the acquisition of equipment for public safety users.

<sup>722</sup> *Second Report and Order*, 22 FCC Rcd at 15448-49 ¶¶ 450-52.

<sup>723</sup> *Second Report and Order*, 22 FCC Rcd at 15437-39 ¶¶ 414-19, 15441 ¶ 425.

<sup>724</sup> *Second Report and Order*, 22 FCC Rcd at 15448 ¶ 45.

<sup>725</sup> *Second Report and Order*, 22 FCC Rcd at 15448 ¶ 450.

for analogous services.<sup>726</sup> We added that our expectation was that the winning bidder of the D Block license and the Public Safety Broadband Licensee would negotiate a fee structure for priority access to the D Block in an emergency that will protect public safety users from incurring unforeseen (and unbudgeted) payment obligations in the event that a serious emergency necessitates preemption for a sustained period.<sup>727</sup>

377. In the *Second Further Notice*, we invited comment on whether we should reconsider any aspect of the rules regarding service fees to be paid by public safety users, including any applicable fees for normal network service and fees for priority access to the D Block in an emergency.<sup>728</sup> We specifically sought comment on whether we should clarify any aspect of these service fees that was left to negotiations.<sup>729</sup> We also asked whether we provided adequate guidance in the *Second Report and Order* to enable the parties to negotiate reasonable rates for all fees, or whether we should adopt a more detailed fee structure or formula to facilitate negotiations on this issue.<sup>730</sup> We asked, for example, whether we should specify that the D Block licensee is entitled to charge rate-of-return or cost-plus rates, taking the incremental costs of public safety network specifications and other costs attributable uniquely to public safety users into account.<sup>731</sup> Alternatively, we asked whether requiring public safety users to pay the same rates as commercial users would be sufficient.<sup>732</sup> We further asked whether we should mandate that public safety users be entitled to receive the lowest rate that the D Block licensee offers to its commercial users for analogous service.<sup>733</sup>

378. We also sought comment on whether particular uses of the public safety broadband network by public safety users should be free and others fee-based, and upon what bases could such distinction should be made.<sup>734</sup> In this regard, we asked whether it is practical to use service- and context-based distinctions, such as between voice and advanced data services, mission-critical and non-mission-critical communications, emergency and non-emergency events, priority and non-priority access, or similar metrics.<sup>735</sup> Alternatively, we asked whether it would be preferable to rely on technical distinctions, such as a specified number of minutes or bits, a percentage of network capacity, or similar metrics.<sup>736</sup> Finally, we asked whether either approach would provide sufficient certainty to public safety users and/or the commercial D Block licensee.<sup>737</sup>

379. Comments. A number of commenters addressed whether the Commission should more clearly define the fees to be charged to public safety users. AT&T, for example, asserted that "it is

<sup>726</sup> *Second Report and Order*, 22 FCC Rcd at 15449 ¶ 451.

<sup>727</sup> *Second Report and Order*, 22 FCC Rcd at 15449 ¶ 451. Elsewhere, we stated that this "[p]riority service, although provided to public safety, will still be commercial, and will not appreciably impair the D Block licensee's ability to provide commercial services to other parties." *Id.* at 15437 ¶ 413.

<sup>728</sup> *Second Further Notice*, 23 FCC Rcd at 8094 ¶ 132.

<sup>729</sup> *Second Further Notice*, 23 FCC Rcd at 8094 ¶ 132.

<sup>730</sup> *Second Further Notice*, 23 FCC Rcd at 8094 ¶ 132.

<sup>731</sup> *Second Further Notice*, 23 FCC Rcd at 8094 ¶ 132.

<sup>732</sup> *Second Further Notice*, 23 FCC Rcd at 8094 ¶ 132.

<sup>733</sup> *Second Further Notice*, 23 FCC Rcd at 8094 ¶ 132.

<sup>734</sup> *Second Further Notice*, 23 FCC Rcd at 8094-95 ¶133.

<sup>735</sup> *Second Further Notice*, 23 FCC Rcd at 8094-95 ¶133.

<sup>736</sup> *Second Further Notice*, 23 FCC Rcd at 8094-95 ¶133.

<sup>737</sup> *Second Further Notice*, 23 FCC Rcd at 8094-95 ¶133.

critically important that the Commission provide additional guidance in this area ... to enable potential commercial participants to evaluate the financial prospects of this venture.”<sup>738</sup> Peha argued that the fees should be set in advance of the auction because “no public safety agency will purchase equipment to use a system unless it can be certain that the monthly fees will be reasonable for the life of that equipment, if not indefinitely.”<sup>739</sup> Similarly, Mercatus urged the Commission to provide “more specificity on what the D Block licensee may charge public safety users.”<sup>740</sup>

380. The PSST indicated that it “understands the desire by some parties that service fees be set prior to the auction, [but] sees no reasonable way of doing so.”<sup>741</sup> Specifically, the PSST argued that “[n]etwork service fees will and should have some correlation to network costs. But those costs will vary considerably depending on the D Block winner.”<sup>742</sup> In this regard, the PSST observed that “[a]n incumbent with built-out infrastructure and an in-place retail service business will have different requirements than a new entrant that would need to build a network from scratch or from a winner that elects to operate on a wholesale-only basis.”<sup>743</sup> Accordingly, the PSST argued that “it is not possible to determine service fees prior to knowing the identity and business plans of the D Block winner.”<sup>744</sup>

381. The PSST added that it is “opposed to allowing the D Block licensee to recoup the incremental cost of a public safety-quality build from public safety users,” which arrangement the PSST argued would “not be materially different than if the PSST were to pay an incumbent wireless carrier to augment its existing facilities to support a public safety-grade 700 MHz system, particularly if the carrier was deploying its own 700 MHz network.”<sup>745</sup> According to the PSST, the “better approach is to encourage the parties to negotiate a mutually acceptable rate(s) for public safety entities, one that will encourage widespread public safety adoption and that also provides the D Block operator with reasonable compensation consistent with the benefits it is receiving from the partnership arrangement,” but in all cases, “the FCC should continue to specify a requirement (or at least an expectation) that the fees paid by public safety users should be substantially lower than the fees paid by the D Block licensee’s commercial customers.”<sup>746</sup>

382. Northrop Grumman urged the Commission “to adopt an objective method for the determination of fees, including a mechanism to segregate and define the charges to public safety users, with cost recovery using a “no profit, no loss” or similar framework.”<sup>747</sup> According to Northrop Grumman, such an approach would “align the incentives of the D Block licensee and the PSBL toward serving public safety’s needs, and ensure that the costs of public safety’s needs are met without conflicting with overall viability of the shared network.”<sup>748</sup>

---

<sup>738</sup> AT&T Comments at 20.

<sup>739</sup> Peha Comments at 13.

<sup>740</sup> Mercatus Comments at 2.

<sup>741</sup> PSST Comments at 37.

<sup>742</sup> PSST Comments at 37.

<sup>743</sup> PSST Comments at 37.

<sup>744</sup> PSST Comments at 37.

<sup>745</sup> PSST Comments at 36.

<sup>746</sup> PSST Comments at 36-37.

<sup>747</sup> Northrop Grumman Comments at 8.

<sup>748</sup> Northrop Grumman Comments at 8.



383. Televate contended that the "maximum service price for priority public safety services must be discounted from list rates by at least 20 percent."<sup>749</sup> Televate also suggested that bidders should somehow be credited for offering "higher levels of discounts off commercial list prices" and "innovative methods to bring the maximum number of public safety personnel on to the network."<sup>750</sup> Gerard Eads, a "communications administrator," urged the Commission to require "that public safety agencies access the system at no recurring charge" and subsidize their fees using revenue from the auction.<sup>751</sup>

384. NTCH proposed the imposition of "a relatively modest usage fee," the proceeds from which could "pay the ongoing costs of the public safety licensee as well as system maintenance."<sup>752</sup> According to NTCH, the service could still be provided at a discount to costs currently incurred by public safety entities and "the charge to public safety users for unlimited calling would be equivalent to similar charges to a private sector user for unlimited calling plans and data transfers over the network."<sup>753</sup> US Cellular asserted that to "increase the attractiveness" of less populated geographic areas in the D Block, the Commission could make "the service fees more commercially attractive (in areas with low volumes of public safety usage, lower charges for the D Block licensee's use of the public safety spectrum, and higher charges for public safety agencies' use of the D Block spectrum)."<sup>754</sup> California argued in favor of implementing "a small incremental cost increase in a 'heavy use' area as a means of offsetting the cost for providing service to a 'low use' area."<sup>755</sup>

385. Some commenters argued that the Federal government should subsidize the public safety network. RPC 33 argues that the user fees should be "fair and equitable to all concerned" and that funding for the network should come from the Federal government until the D Block spectrum becomes profitable.<sup>756</sup> Wireless RERC supported capping fees that could be charged to public safety entities and contends the network costs could be subsidized using "funds appropriated by Congress, federal grants, or a cost-recovery fund."<sup>757</sup>

386. APCO indicated that "per unit and aggregate service pricing has been a major concern for APCO since the inception of this process."<sup>758</sup> Specifically, APCO argued that "it will almost always cost more to provide an equal level of service to the smaller agency that works in remote areas and have wide jurisdictional areas than it will to cover a dense urban area."<sup>759</sup> APCO suggested that the imbalance in equalizing rates between populated versus less populated areas could be addressed through such measures as "blanket Federal subsidies," "a rate structure that is subsidized by the other users," or for the Commission "to collect a user fee on all users, similar to a 911 service fund or fee."<sup>760</sup> In all cases,

---

<sup>749</sup> Televate Comments at 10.

<sup>750</sup> Televate Comments at 10.

<sup>751</sup> Eads Comments at 3.

<sup>752</sup> NTCH Comments at 6.

<sup>753</sup> NTCH Comments at 6.

<sup>754</sup> US Cellular Comments at 14, 22.

<sup>755</sup> California Comments at 5.

<sup>756</sup> RPC 33 Comments at 5.

<sup>757</sup> Wireless RERC Comments at 12-13.

<sup>758</sup> APCO Comments at 14.

<sup>759</sup> APCO Comments at 14.

<sup>760</sup> APCO Comments at 15.

however, APCO recommended that the Commission "take full advantage of an advisory rate board, commission or advisory group to assist in establishing the rates and future adjustments to them."<sup>761</sup>

APCO also suggested that the Commission allow the "PSBL and the D Block licensee to negotiate with qualified public safety agencies to accept capital investments or the use of publicly funded capital investment in exchange for reduced rates."<sup>762</sup>

387. AT&T argued that the Commission "must promulgate guidelines that address the service fees commercial partners may charge local public safety users . . ."<sup>763</sup> AT&T further argued that "[p]otential commercial partners require such clarification in order to evaluate the financial prospects of this venture" and that, therefore, if "the Commission intends to restrict the type or amount of service fees a commercial partner may charge a local public safety user, the Commission must clearly explain this restriction prior to an RFP process or a reauction."<sup>764</sup>

388. Discussion. Resolving the matter of service fees for public safety use of the broadband network requires us to carefully balance the interests of potential D Block bidders and public safety users of the network.<sup>765</sup> It is also important to provide both sets of stakeholders with a fee structure that is reasonably stable and predictable, notwithstanding the difficulty of determining such fees given the limited information before us.<sup>766</sup> We agree with commenters that potential commercial participants need sufficient pre-auction information regarding fees to help them evaluate the financial prospects of providing both a commercial- and public safety-oriented service.<sup>767</sup> Similarly, we believe that public safety agencies need specificity regarding prospective fees in order to ensure their timely commitment to use the public safety spectrum and to enable them to plan and budget for the use of the new network.

389. As an initial matter, with regard to those commenters who argue that the fees charged to public safety users of the shared network should be subsidized by the Federal government, whether on an ongoing basis or through the use of auction proceeds,<sup>768</sup> we note that we lack the authority to obligate Federal funds in such fashions. In addition, while we find Northrop Grumman's concept of a "no profit, no loss" or similar framework appealing,<sup>769</sup> we do not believe that we should prohibit the D Block licensee from deriving income from public safety users of the public safety spectrum. We agree with the general consensus of most commenters, however, that any fees charged to public safety users should be discounted as compared to the fees charged to commercial users.

390. We tentatively conclude, therefore, that we should establish fixed nationwide service fees that the D Block licensee may charge to public safety users based upon a discounted rate schedule. We believe that adopting a fee schedule nationwide will ensure uniform standards and practices in the 700

---

<sup>761</sup> APCO Comments at 15.

<sup>762</sup> APCO Comments at 16.

<sup>763</sup> AT&T Reply Comments at 20; *see also* Northrop Grumman Comments at 7-8; Peha Comments at 13; Wireless RERC Comments at 12-13.

<sup>764</sup> AT&T Reply Comments at 20. AT&T also recommended guidelines addressing spectrum usage fees, and asserted that, if "the Commission permits the PSBL to charge access fees, the Commission should ensure that such payments be negotiated . . . using commercial practices for cost recovery for the PSBL." *Id.*

<sup>765</sup> *See* AT&T Comments at 20. We also recognize Peha's argument that a failure to determine rates *ex ante* could adversely affect public safety purchase of 700 MHz equipment. *See* Peha Comments at 13.

<sup>766</sup> *See* Peha Comments at 13.

<sup>767</sup> *See, e.g.,* AT&T Comments at 20.

<sup>768</sup> *See* Eads Comments at 3.

<sup>769</sup> *See* Northrop Grumman Comments at 8.